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MOHD ISA BIRAN v. KHATIJAH ABDULLAH & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
ALIZATUL KHAIR OSMAN JCA
MAH WENG KWAI JCA
B [CIVIL APPEAL NO: W-02(IM)(NCVC)-2875-12-2012]
8 OCTOBER 2014

LIMITATION: *Commencement of action – When action commenced – Whether cause of action was for breach of contract or for recovery of land – Whether cause of action commenced from breach of sale and purchase agreement or after discovery of caveats lodged on land – Limitation Act 1953, ss. 6(1)(a), 9*

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The first, second, third and fourth respondents together with one Mohtar Abdullah ('Mohtar') were the registered owners of a plot of land ('the said land'). After the death of Mohtar, his share of the land was vested in the name
D of his beneficiaries namely, the fifth, sixth, seventh, eighth and ninth respondents. On 8 September 1992 the first, second, third and fourth respondents together with Mohtar entered into a sale and purchase agreement ('SPA') with the appellant for the sale of the said land at the price of RM200,000. The parties had appointed one Khairuddin Sulaiman
E ('Khairuddin') as their joint solicitor ('the solicitor') to attend to the transaction. Pursuant to the terms of the SPA, the appellant paid the deposit of RM70,000 and the first, second, third and fourth respondents as well as the late Mohtar delivered the original issue document of title to the solicitor. Subsequently, on 14 September 1993, the first, second, third and fourth
F respondents and the late Mohtar executed a power of attorney ('POA') in favour of the appellant to deal with the said land. Sometime after the execution of the SPA, the appellant was adjudicated a bankrupt and consequently was unable to perform the contract due to his incapacity. In the circumstances, the respondents contended that the appellant had at all material times failed and/or neglected to perform the terms and conditions
G of the SPA and proceeded to revoke the POA. Meanwhile, the appellant lodged a private caveat on the said land on 12 November 2010. The respondents subsequently commenced the present suit and sought *inter alia* (i) a declaration that the SPA was no longer valid in law and the deposit paid to be forfeited; (ii) a declaration that the POA was invalid in law; and (iii)
H a declaration that the private caveat was invalid and ordered to be removed. The appellant, on the other hand, contended that the respondents had unlawfully revoked the POA and had fraudulently obtained a duplicate issue document of title. Thus, the appellant counter-claimed against the respondent and sought declarations, namely, (i) that the SPA was valid and enforceable;
I and (ii) that the POA was valid and enforceable. The Judicial Commissioner of the High Court ('JC') dismissed the appellant's counter-claim and entered judgment for the respondents. Dissatisfied, the appellant appealed against the

decision of the JC. During appeal, the appellant contended that as the respondents' cause of action was based on breach of SPA, s. 6(1)(a) of the Limitation Act 1953 ('the LA') should apply, as such, the respondents' claim was time barred. The respondents, on the contrary, argued that they were not time barred as time began to run only after the moment that there was a threat to the respondents' rights to sell the said land. Therefore, it was the respondents' contention that time began to run only from 12 July 2011 *ie*, the date the respondents discovered the caveats lodged on the said land. Thus, as s. 9 of the LA stipulated that any action to recover land must be brought within 12 years of the date on which the right of action accrued, the respondents were of the view that they were well within time when they filed their action in 2012.

Held (allowing appeal)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) It was the respondents' statement of claim that their cause of action was for breach of contract *ie* the SPA and not for the recovery of land. Thus, the applicable provision was s. 6(1)(a) of the LA and not s. 9 of the LA as contented by the respondents. As such, the breach accrued when the appellant failed to apply for the consent of the State Authority for the transfer of the said land and when he failed to pay the balance of the purchase price. (paras 26-28)

(2) Despite being fully aware that the appellant's conduct amounted to a breach of the SPA, especially since time is of essence of the agreement under the SPA, the respondents chose not to exercise their right to terminate the agreement which they were entitled to under the SPA. The respondents however took almost 20 years after the breach occurred before filing the present suit. In doing so, the respondents were caught by s. 6(1)(a) of the LA and the respondents' claim was therefore time barred. The trial judge had erred in failing to consider the issue of limitation as it was patently clear from the facts that limitation had set in. (paras 34-36)

(3) Although the appellant's appeal of his counterclaim was allowed, there was no reason to disagree with the trial judge's finding that the appellant failed to establish that the respondents acted fraudulently when they applied for the duplicate title or when the respondent reported the loss of the original issue document of title to the land office. The POA executed by the respondents in favour of the appellant was invalid as it was not authenticated in accordance with s. 3(1)(b) of the Powers of Attorney Act 1949. From the evidence, the solicitor did not have a valid practising certificate at the time he attested the POA. As such, the solicitor did not have the capacity to attest the POA. (paras 43 & 44)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama, kedua, ketiga dan bersama-sama dengan satu Mohtar Abdullah ('Mohtar') adalah pemilik berdaftar sebidang tanah ('tanah tersebut'). Selepas kematian Mohtar, bahagiannya dalam tanah tersebut terletak hak atas nama benefisiari-benefisiari beliau iaitu, responden kelima, keenam, ketujuh, kelapan dan kesembilan. Pada 8 September 1992, responden pertama, kedua, ketiga dan keempat bersama-sama dengan Mohtar telah memasuki satu perjanjian jual beli ('PJB') dengan perayu bagi jualan tanah tersebut pada harga RM200,000. Pihak-pihak telah melantik satu Khairuddin Sulaiman ('Khairuddin') sebagai peguam bersama mereka ('peguam tersebut') untuk menguruskan urus niaga tersebut. Menurut syarat-syarat PJB, perayu telah membayar deposit sebanyak RM70,000 dan responden pertama, kedua, ketiga dan keempat berserta mendiang Mohtar telah menyampaikan dokumen asal hakmilik tanah kepada peguam tersebut. Kemudiannya, pada 14 September 1993, responden pertama, kedua, ketiga dan keempat dan mendiang Mohtar telah melaksanakan satu surat kuasa wakil ('SKW') bagi pihak perayu untuk berurusan dengan tanah tersebut. Selepas pemeteraian PJB, perayu telah dihukum bankrap dan seterusnya tidak dapat melaksanakan kontrak tersebut oleh kerana ketidakupayaan perayu. Dalam keadaan ini, responden-responden berhujah bahawa perayu telah pada setiap masa yang material gagal dan/atau cuai untuk melaksanakan terma-terma dan syarat-syarat SKW dan telah menarik balik SKW. Sementara itu, perayu telah memasukkan kaveat persendirian ke atas tanah tersebut pada 12 November 2010. Responden-responden kemudiannya telah memulakan prosiding ini dan memohon antara lain (i) suatu pengisytiharan bahawa PJB tidak lagi sah di sisi undang-undang dan deposit yang dibayar dilucuthakkan; (ii) suatu pengisytiharan bahawa SWK tidak sah di sisi undang-undang; dan (iii) suatu pengisytiharan bahawa kaveat persendirian adalah tidak sah dan diperintahkan supaya dibatalkan. Perayu di sebaliknya, menegaskan bahawa responden-responden telah dengan tidak sah membatalkan SWK dan telah secara penipuan mendapatkan salinan dokumen hakmilik tanah. Oleh itu, perayu telah menuntut balas dan memohon pengisytiharan, antara lain, (i) bahawa PJB adalah sah dan boleh dikuatkuasakan; dan (ii) bahawa SWK tersebut adalah sah dan boleh dikuatkuasakan. Pesuruhjaya Kehakiman Mahkamah Tinggi ('PK') telah menolak tuntutan balas perayu dan telah memasukkan penghakiman untuk pihak responden-responden. Terkilan, perayu telah merayu terhadap keputusan PK. Semasa rayuan, perayu berhujah bahawa oleh kerana tindakan responden-responden berdasarkan kemungkiran PJB, s. 6(1)(a) Akta Had Masa 1953 ('Akta Had') adalah terpakai, oleh itu, tuntutan responden-responden adalah dihadkan oleh masa. Responden-responden, sebaliknya, berhujah bahawa mereka tidak dihadkan oleh masa kerana masa mula berjalan selepas terdapat ancaman kepada hak responden untuk menjual tanah tersebut. Oleh itu, adalah hujahan responden-responden, bahawa masa

mula berjalan hanya mulai 12 Julai 2011, iaitu tarikh responden-responden mendapati kemasukan kaveat ke atas tanah tersebut. Justeru, kerana s. 9 Akta Had menetapkan bahawa apa-apa tindakan untuk mendapatkan kembali tanah mesti dibuat dalam tempoh 12 tahun dari tarikh di mana hak tindakan terakru, responden-responden berpendapat bahawa mereka dalam had masa apabila mereka memfailkan tindakan mereka pada tahun 2012.

Diputuskan (membenarkan rayuan)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Adalah pernyataan tuntutan responden-responden bahawa kuasa tindakan mereka adalah berdasarkan kemungkiran kontrak iaitu PJB dan bukan untuk mendapatkan kembali tanah. Oleh itu, peruntukan yang terpakai adalah s. 6(1)(a) Akta Had dan bukan s. 9 Akta Had. Oleh itu, kemungkiran terakru apabila perayu gagal untuk memperoleh persetujuan Kerajaan Negeri bagi pindah milik tanah tersebut dan apabila perayu gagal membayar baki harga belian.

(2) Walaupun menyedari sepenuhnya bahawa kelakuan perayu terjumlah kepada kemungkiran PJB, terutamanya apabila masa adalah intipati persetujuan PJB, responden-responden memilih untuk tidak menggunakan hak mereka untuk menamatkan perjanjian tersebut yang responden-responden berhak di bawah PJB. Responden-responden bagaimanapun mengambil masa hampir 20 tahun selepas kemungkiran tersebut sebelum memfailkan saman ini. Dengan berbuat demikian, responden-responden telah terangkum di bawah s. 6 (1)(a) Akta Had dan tuntutan responden-responden telah dihalang oleh had masa. Hakim bicara telah terkhilaf apabila gagal mempertimbangkan isu had masa walaupun jelas daripada fakta bahawa had masa telah bermula.

(3) Walaupun rayuan perayu terhadap tuntutan balas beliau telah dibenarkan, tiada sebab untuk tidak bersetuju dengan dapatan hakim bicara berkenaan kegagalan perayu untuk membuktikan bahawa responden-responden melakukan penipuan apabila mereka memohon untuk hakmilik pendua atau apabila responden-responden melaporkan kehilangan dokumen asal hakmilik tanah kepada pejabat tanah. SKW yang disempurnakan oleh responden-responden bagi pihak perayu adalah tidak sah kerana ia tidak disahkan mengikut peruntukan s. 3(1)(b) Akta Surat Kuasa Wakil 1949. Dari keterangan, peguam tersebut tidak mempunyai sijil amalan yang sah ketika memperakui SKW. Oleh itu, peguam tersebut tidak mempunyai kapasiti untuk memperakui SKW.

Case(s) referred to:
Nasri v. Mesah [1971] 1 LNS 85 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1)(a), 9
Powers of Attorney Act 1949, s. 3(1)(b)

For the appellant - Vincent Yap; M/s Chambers Of Richard Ho & Yap
For the respondents - Abd Shukor Ahmad; M/s Shukor Baljit & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22 NCVC-8-01-2012]

Reported by Sandra Gabriel

JUDGMENT

Alizatul Khair Osman JCA:

[1] This is an appeal by the appellant (the defendant) against the decision of the learned Judicial Commissioner who had, after a full trial, allowed the respondents' ('the plaintiffs') claim as per para. 20(a) to (e) of their statement of claim and dismissed the appellant's counterclaim.

[2] After hearing submissions from both parties, we allowed the appeal on both the main claim and the counterclaim.

[3] Our reasons appear below.

[4] For the purpose of this judgment the appellant and respondents will be referred to as the defendant and plaintiffs respectively.

Background Facts

[5] The first, second, third and fourth plaintiffs together with one, Mohtar bin Abdullah were at the material time the registered owners of a plot of land held under PM No. 256, Lot 13648, Kg Sg Kayu Ara, Mukim Sungai Buloh, District of Petaling, State of Selangor Darul Ehsan ('the said land').

[6] After the death of Mohtar bin Abdullah, his share of the land was vested in the name of his beneficiaries namely, the fifth, sixth, seventh, eighth and ninth plaintiffs. Sometime in 1992, the first, second, third and fourth plaintiffs together with Mohtar bin Abdullah entered into a sale and purchase agreement with the defendant for the sale of the said land at the price of RM200,000. The parties had appointed En Khairuddin bin Sulaiman ('DW2') as their joint solicitor ('the solicitor') to attend to the transaction.

[7] The solicitor drafted the sale and purchase agreement ('SPA') and the same was executed by the parties on 8 September 1992. The SPA contained the following salient terms:

(i) Upon execution of the SPA the purchaser shall pay a deposit of RM70,000 (cl. 1);

(ii) The balance purchase price of RM130,000 shall be paid to the solicitor as stakeholder within three months from the date the state Authority's approval to transfer is obtained (cl. 3);

(iii) The vendors shall deliver the original of the land title to the solicitor and sign a Memorandum of Transfer ('Form 14A NLC') for the purpose of assessment of stamp duty and registration at the land office after payment of the balance purchase price (cl. 2);

(iv) The solicitor shall deliver the balance purchase price within seven days from the presentation date of the land office and the vendors shall deliver vacant possession to the purchaser upon settlement of the balance purchase price (cls. 6 and 8 respectively).

(v) In the event the purchaser fails to settle the balance purchase price, the vendors have the right to terminate the sale and purchase agreement and the purchaser is not entitled to claim anything from the vendor (cl. 4);

(vi) In the event the State Authority's consent for the transfer cannot be obtained then the vendors shall refund the deposit sum of RM70,000 and the agreement is deemed terminated (syarat-syarat khas/special conditions); and

(vii) Time shall be the essence of the contract (cl. 10).

[8] The defendant paid the deposit of RM70,000 as required under the SPA and the first, second, third, fourth plaintiffs and the late Mohtar bin Abdullah delivered the original issue document of title to the solicitor. On or about 14 September 1993, the first, second, third, fourth plaintiffs and the late Mohtar Abdullah executed a power of attorney in favour of the defendant to deal with the said land.

[9] Sometime after the execution of the SPA, the defendant was adjudicated a bankrupt and consequently was unable to perform the contract due to his incapacity.

[10] In the circumstances the plaintiffs contended that the defendant had at all material times failed and/or neglected to perform the terms and conditions of the SPA.

[11] The plaintiffs further averred when they had not been paid the balance purchase price, the second plaintiff ('PW1') went to look for the solicitor to enquire as to the status of the transaction. However as the solicitor was no longer in practice the plaintiffs were unable to locate him. The plaintiffs then proceeded to revoke the power of attorney and instituted the present suit.

[12] The defendant meanwhile lodged a private caveat on the said land on 12 November 2010 *vide* caveat presentation No. 4173/2010.

[13] The plaintiffs in the present suit are seeking, *inter alia* the following reliefs:

(a) a declaration that the SPA is no longer valid in law and the deposit paid to be forfeited;

A (b) a declaration that the power of attorney dated 14 September 1993 is invalid in law;

(c) a declaration that the aforesaid private caveat is invalid and be ordered removed;

B (d) an order to restrain the defendant from dealing with the said land; and

(e) damages and costs.

[14] The defendant on the other hand pleads in para. 7 of his defence that he paid the balance purchase sum of RM130,000 to the first, second, third, fourth plaintiffs and the late Mohtar bin Abdullah and following that the C original title to the said land was handed over to the defendant by the first, second, third, fourth plaintiffs and the late Mohtar bin Abdullah. The defendant further pleads that following the payment of the sum of RM130,000 the first, second, third, fourth plaintiffs and the late Mohtar bin Abdullah had given a general power of attorney in favour of the defendant D to deal with the said land. The defendant avers that the power of attorney is irrevocable.

[15] The defendant further contended that the plaintiffs have unlawfully revoked the power of attorney and that the plaintiffs have fraudulently obtained a duplicate issue document of title. The defendant counterclaimed E against the plaintiffs and sought various declaratory orders and damages as well as costs.

Decision Of The High Court

[16] The learned Judicial Commissioner, at the conclusion of the trial F found as follows:

> On the totality of the evidence, I find that the Plaintiffs have given ample opportunity for the Defendant to perform his part of the bargain. However, the Defendant has failed. Therefore the Plaintiffs are entitled to rescind the SPA and be discharged from further performance of the G SPA. This right to terminate the agreement is found in the SPA, where it is clearly provided that if the Defendant fails to pay the balance purchase price then, the Plaintiffs would have the right to terminate the SPA. In the circumstance, I find that the Plaintiffs have proved their case on a balance of probabilities, while the Defendant has failed to establish his counter-claim.

H He accordingly dismissed the defendant's counterclaim and entered judgment for the plaintiffs for their claim as per paras. 20(a) to (e) of the statement of claim.

Our Decision

I **[17]** The sole issue before us was whether the plaintiffs' claim was barred by limitation.

[18] The defendant had in para. 27 of their defence and counterclaim raised the issue of limitation. Paragraph 27 reads as follows:

> 27. Defendan menyatakan bahawa tuntutan-tuntutan plaintif-plaintif adalah sesungguhnya tidak sah dan terbatal oleh had masa ("time barred") di bawah undang-undang mantap.

[19] In his submission learned counsel for the defendant contended that as the plaintiffs' cause of action is based on a breach of the SPA, s. 6(1)(a) of the Limitation Act 1953 ('the Limitation Act') should apply and as such the plaintiffs' claim was clearly time barred.

[20] The plaintiffs on the other hand contended that they were not time barred as time begins to run only from the moment there is a threat to the plaintiffs' right to transfer the said land.

[21] The plaintiffs rely on the case of *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 in which the Federal Court, whilst holding that in the case of actions founded on contract, time runs from breach, in the case of actions founded on any other right, time runs from the date on which that right is infringed or there is threat of its infringement.

[22] In the present case the plaintiffs contended that they encountered several threats to their rights over the said land such as the following:

(a) the plaintiffs could not enter into another sale and purchase agreement after discovering that a few caveats had been lodged over the said land including one (a Registrar's caveat) lodged by the defendant as evidenced by the official land search dated 12 July 2011.

(b) as the balance purchase price had not been paid by the defendant and the plaintiffs were unable to trace the possession of the original title of the said land, they were compelled to apply for a duplicate copy of the said title on 20 December 2010. In this regard the person who was in possession of the original title may at any time deal with the said land without the plaintiffs' knowledge thus prejudicing their right over the said land.

[23] It was the plaintiffs' contention that in light of the above, time begins to run only from 12 July 2011, ie, the date the plaintiffs discovered the caveats lodged on the said land.

[24] As s. 9 of the Limitation Act stipulates that any action to recover land must be brought within 12 years of the date on which the right of action accrued to him, the plaintiffs were of the view that they were well within time when they filed this action in 2012.

[25] With due respect to learned counsel for the respondent, we are unable to agree with his submission.

[26] It is clear from the plaintiffs' statement of claim that the plaintiffs' cause of action is for breach of contract (ie, the SPA) and not for recovery of land. This can be seen from the following paragraphs:

> (i) Adalah menjadi satu terma Perjanjian Jual Beli tersebut di Klausa 3 dan Jadual Perjanjian Jual Beli tersebut, baki harga beliau iaitu sebanyak RM130,000.00 (selepas ini dirujuk sebagai "baki harga belian tersebut") perlu dibayar dalam tiga (3) bulan daripada tarikh kebenaran memindahmilik diperolehi dan lanjutan masa pembayaran adalah dibenarkan iaitu satu (1) bulan daripada tarikh tamat perjanjian dan masa adalah menjadi asas Perjanjian Jual Beli tersebut.
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> (ii) Adalah kewajipan Defendan untuk memohon kebenaran pindahmilik daripada pihak berkuasa negeri. Defendan tidak pernah memohon kebenaran pindahmilik.
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> (iii) Plaintif menegaskan bahawa selepas Perjanjian Jual Beli tersebut ditandatangani, Defendan telah dihukum Bankrap.
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> (iv) *Dalam memungkiri Perjanjian Jual Beli tersebut, Defendan telah gagal, cuai dan/atau abai untuk mematuhi terma-terma Perjanjian Jual Beli tersebut dan/atau telah tidak ada upaya kerana Bankrap. Kemungkiran oleh Defendan ini adalah merupakan satu penolakan salah kontrak (repudiation of contract) dan/atau pemecahan asas kontrak (fundamental breach of contract)* dan Plaintif-plaintif adalah berhak menguatkuasakan hak-hak Plaintif dan berdasarkan kepada Klausa 4 Perjanjian Jual Beli tersebut, Plaintif-plaintif berhak membatalkan Perjanjian Jual Beli tersebut. (emphasis added)

[27] Thus the applicable provision is s. 6(1)(a) of the Limitation Act and not s. 9 as contended by the plaintiffs. By virtue of s. 6(1), actions founded on contract must be filed within six years of the date the cause of action accrued, which according to *Nasri v. Mesah*, would be six years from the date the breach occurred.

[28] In this case the breach occurred when the defendant failed to apply for the consent of the State Authority for the transfer of the said land and when he failed to pay the balance of the purchase price as provided for under cl. 3 of the SPA read together with the Schedule. The plaintiffs however took almost 20 years after the breach occurred before filing this present suit.

[29] The SPA was signed on 8 September 1992. Under cl. 3 of the SPA (read together with the Schedule), the defendant was obliged to pay the balance purchase price of RM130,000 to the solicitor as stakeholder within three months (or a further one month extension as the case may be) of the date the consent of the State Authority is obtained.

[30] It is not in issue and accepted by the learned judge that the obligation to apply for the State Authority's consent to transfer the said land rests with the defendant. The learned judge found that based on the solicitor's ('DW2')

testimony "the State Authority's consent was never procured". In fact according to the learned judge "there is no evidence that the consent to transfer was ever applied for". A

[31] PW2 (Kamaruzaman bin Abdullah) in his evidence-in-chief averred that the "urusan jual beli hartanah tersebut telah tertangguh terlalu lama, selama lebih kurang 20 tahun". PW2 went on to state that during that period "plaintif-plaintif tidak pernah menerima apa-apa pembayaran penuh mahu pun maklum balas daripada defendan untuk proses pindah milik hartanah tersebut". B

[32] It was further averred by PW2 that: C

> Perlakuan Defendan tersebut jelas menunjukkan satu kemungkiran, kegagalan dan/atau kecuaian Defendan untuk mematuhi terma-terma dalam Perjanjian Jual Beli tersebut dan merupakan satu pemecahan asas kontrak di bawah klausa 4 Perjanjian Jual Beli tersebut.

[33] The above evidence confirms the plaintiffs' case that they have not (allegedly) for the last 20 years received any payment for the balance purchase price nor any feedback from the defendant as regards the process of transfer of the said land. D

[34] Despite being fully aware that the defendant's conduct as such amounted to a breach of the SPA, especially since time is the essence of the agreement under the SPA (cl. 10), the plaintiffs chose not to exercise their right to terminate the agreement which they are entitled to under cl. 4 of the SPA. Instead the plaintiffs waited until 2012 before instituting this suit to seek, amongst others a declaration that the SPA is no longer valid in law. E

[35] We find that in doing so the plaintiffs were clearly caught by s. 6(1)(a) of the Limitation Act and the plaintiffs' claim was therefore time barred. F

[36] In our view, the learned judge erred in failing to consider at all the issue of limitation as it was patently clear from the facts that limitation had set in at the time the writ was filed. G

[37] We accordingly allowed the defendant's appeal in respect of the main claim and set aside the learned judge's decision.

[38] As regards the counterclaim, the defendant had prayed for the following reliefs against the plaintiffs, namely: H

> (a) Satu Deklarasi bahawa Perjanjian Jual Beli bertarikh 8hb September, 1992 antara Defendan sebagai Pembeli dengan Plaintif-Plaintif Pertama, kedua, Ketiga, Keempat dan Mohtar Bin Abdullah, si mati tersebut sebagai Penjual berkenaan dengan hartanah yang dikenali sebagai PM 256, Lot 13648, Mukim Sungai Buluh, Daerah Petaling, Tempat Kampung Kayu Ara Negeri Selangor (selepas ini dirujuk sebagai "Hartanah tersebut") adalah sah dan berkuatkuasa di bawah undang-undang; I

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(b) Satu Deklarasi bahawa Surat Kuasa Wakil bertarikh 14hb September, 1993 di bawah Pendaftaran No. 32544/93 di Mahkamah Tinggi Kuala Lumpur pada 23hb September, 1993 yang telah diberikan oleh Plaintif-Plaintif Pertama, Kedua, Ketiga, Keempat dan Mohtar Bin Abdullah, si mati tersebut kepada Defendan berkenaan dengan Hartanah tersebut adalah sah dan berkuatkuasa di bawah undang-undang;

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(c) Satu Deklarasi bahawa salinan Asli Geran Asal Hakmilik Hartanah tersebut yang dikenali sebagai PM 256, Lot 13648, Mukim Sungai Buluh, Daerah Petaling, Tempat Kampung Kayu Ara Negeri Selangor yang berada di dalam kustodi, penjagaan, kawalan dan possessi Defendan di mana sesalinannya seperti mana dilampirkan bersama Perintah ini adalah sah dan berkuatkuasa di bawah undang-undang;

C

(d) Satu Deklarasi bahawa salinan Pendua atau apa-apa salinan Geran hak milik Hartanah tersebut yang dikenali sebagai PM 256, Lot 13648, Mukim Sungai Buluh, Daerah Petaling, Tempat Kampung Kayu Ara Negeri Selangor yang berada di dalam kustodi, penjagaan, kawalan dan possessi Plaintif-Plaintif Pertama, Kedua, Ketiga, Keempat, Kelima, Keenam, Ketujuh, Kelapan dan Kesembilan adalah tidak sah dan tidak berkuat kuasa di bawah undang-undang dan terbatal;

D

E

(e) Satu Deklarasi bahawa segala apa kaveat persendirian atau kaveat-kaveat persendirian yang wujud pada Hartanah tersebut yang telah dimasukkan oleh Plaintif-Plaintif Pertama, Kedua, Ketiga, Keempat, Kelima, Keenam, Ketujuh, Kelapan dan Kesembilan secara bersesama atau berasingan dan/atau oleh mana-mana pihak lain selain daripada oleh Defendan dan PYS Group (M) Sdn Bhd sebelum dan/atau selepas tindakan ini dimulakan adalah tidak sah dan tidak berkuatkuasa di sisi undang-undang dan terbatal serta satu perintah supaya kaveat persendirian atau kaveat-kaveat persendirian dikeluarkan daripada rekod pendaftaran Geran Hakmilik Hartanah tersebut oleh pihak Pendaftar Pejabat Tanah yang berkenaan.

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(f) Plaintif-Plaintif Pertama, Kedua, Ketiga, Keempat, Kelima, Keenam, Ketujuh, Kelapan dan Kesembilan secara bersesama dan berasingan dikehendaki membayar pampasan kerugian dan/atau gantirugi kepada Defendan atas segala apa-apa dan ke semua tuntutan, tindakan, guaman, perbelanjaan dan/atau kos oleh mana-mana pihak dan secara khususnya oleh PYS Groups (M) Sdn. Bhd.;

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(g) Plaintif-Plaintif Pertama, Kedua, Ketiga, Keempat, Kelima, Keenam, Ketujuh, Kelapan dan Kesembilan dikehendaki membayar gantirugi teladan secara bersesama dan/atau berasingan kepada Defendan;

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(h) Plaintif-Plaintif Pertama, Kedua, Ketiga, Keempat, Kelima, Keenam, Ketujuh, Kelapan dan Kesembilan dikehendaki membayar secara bersesama dan/atau berasingan gantirugi am yang ditaksirkan kepada Defendan dan satu tarikh ditetapkan untuk penaksiran gantirugi am tersebut;

(i) Faedah pada kadar Empat Peratus (4%) setahun atas jumlah gantirugi teladan tersebut yang dikira dari tarikh pemfailan Tuntutan Balas ini sehingga ke tarikh penghakiman Tuntutan Balas;

(j) Faedah pada kadar Empat Peratus (4%) setahun atas jumlah gantirugi teladan tersebut yang dikira dari tarikh penghakiman Tuntutan Balas sehingga ke tarikh penyelesaian sepenuhnya;

(k) Faedah pada kadar Empat Peratus (4%) setahun atas jumlah gantirugi am tersebut yang dikira dari tarikh pemfailan Tuntutan Balas ini sehingga ke tarikh penghakiman Tuntutan Balas;

(l) Faedah pada kadar Empat Peratus (4%) setahun atas jumlah gantirugi am tersebut yang dikira dari tarikh penghakiman Tuntutan Balas sehingga ke tarikh penyelesaian sepenuhnya;

(m) Kos tindakan ini; dan

(n) Lain-lain relif dan/atau perintah selanjutnya yang Mahkamah Mulia ini berpendapat sesuai, wajar dan manafaat.

[39] Following from our decision above, we allowed the defendant's appeal against the dismissal of his counterclaim. We therefore set aside the learned judge's decision and in place thereof we grant order in terms of prayers (a), (c), (d), (e), (h), (k), (l) and (m).

[40] Prayer (e) is limited only to the caveats lodged by the plaintiffs and does not include any caveat lodged by a third party. Prayer (f) is thereby not allowed.

[41] We find no basis to award exemplary damages to the defendant hence prayers (g), (i) and (j) are not allowed. In respect of prayer (h) we order that damages be assessed by the Registrar of the High Court.

[42] We award the defendant RM30,000 as costs here and below and order that the deposit be refunded to the plaintiffs.

[43] Whilst we allowed the defendant's appeal in respect of his counterclaim, we find no reason to disagree with the learned judge's finding that the defendant failed to establish that the plaintiffs acted fraudulently when they applied for the duplicate title or when they reported the loss of the original issue document of title to the land office.

[44] We also upheld the learned judge's finding that the power of attorney executed by the plaintiffs in favour of the defendant is invalid as it was not authenticated in accordance with s. 3(1)(b) of the Powers of Attorney Act

A 1949. The power of attorney was authenticated by the solicitor in his capacity as an advocate and solicitor of the High Court of Malaya. It was decidedly clear from the evidence before the court, in fact it was not disputed, that the solicitor did not have a valid practicing certificate at the time he attested the power of attorney. As such he did not have the capacity
B to attest the power of attorney. Hence prayer (b) of the defendant's counterclaim is not allowed.

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